MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

STANLEY S. MOLES, M.D. Petitioner, vs. MORTON F. PLANT HOSPITAL ASSOCIATION, INC., a Florida not-for-profit corporation, JOHN B. SWEGER; PAUL STRAUB, M.D.; T. JOHNSON ROSS, M.D.; LAWRENCE R. BUCKLEY, M.D.; RICHARD MERI-WETHER, M.D.; and WADE HATCHER, M.D., Respondents.	)	Case No. 80-154

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE

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STATEMENT OF THE CASE

The Petitioner's Complaint was filed July 21, 1976. It was amended on September 3, 1976, and Myron W. Wheat, M.D., was added as a party plaintiff. Defendants moved to dismiss the amended complaint on September 27, 1976, and extensive Memoranda of Law were filed by both sides. Oral argument on the motion was had on October 12, 1977, and on May 10, 1978, the court entered its Memorandum Opinion and Judgment of Dismissal, copies of which are attached to the petitioner's brief.

Notice of Appeal was filed on June 7, 1980, by plaintiff, Moles, contesting the court's ruling on the dismissal of Count I of the amended complaint pertaining solely to Sherman Antitrust violations. No appeal was taken on the remainder of the court's order, nor did plaintiff Wheat join in the appeal as to any Counts. Oral argument was had before the United States Court of Appeals for the Fifth Circuit on May 6, 1980. The Per Curiam Affirmance of the District Court opinion was entered on May 8, 1980. Petition for Writ of Certiorari was filed in the Court on August 1, 1980.

STATEMENT OF THE FACTS

Petitioner Moles is a cardiologist, licensed to practice medicine in Florida, and was previously on the staff at Morton F. Plant Hospital, which is located in Clearwater, Pinellas County, Florida. On April 7, 1976, after a myriad of hearings and appeals, the Board of Trustees of the defendant hospital followed the recommendation of the Credentials Committee, the Executive Committee of the medical staff, the ad hoc Committee of the medical staff, and the Appellate Review Committee, and did not reappoint Petitioner Moles to the hospital's medical staff. The hospital's by-laws provide for this procedure, and it was fully and correctly carried out. Petitioner Moles has not contested that procedure by was of his lawsuit or any of the appeals in relation thereto.

Previously, Plaintiff Wheat, a cardiovascular and thoracic surgeon specializing in open heart surgery, had made application for staff privileges at Morton F. Plant Hospital to become a member of the hospital's open heart surgery team. His application was denied.

Petitioner Moles and Plaintiff Wheat filed their amended complaint in three Counts based on 1) Sherman Antitrust violations, 2) Civil Rights and Constitutional violations, and 3) Defamation, pertaining to Petitioner Moles alone. Only Petitioner Moles appealed the dismissal of the action, and his appeal pertained only to Count I relating to Sherman Antitrust violations.

The amended complaint identifies the defendants as the Morton F. Plant Hospital, a Florida not-for-profit corporation, located in Clearwater, Pinellas County, Florida; the chairman of the hospital's Board of Trustees; the executive director of the hospital; chief of the medical staff of the hospital; and the individual members of the ad hoc Committee of the Executive Committee of the hospital.

Petitioner Moles utilized fourteen paragraphs under the heading of "Trade and Commerce" to state that he ultimately receives some funds for services rendered to his patients from out of state insurance companies and from the Medicare and Medicaid programs of the Federal Government. Thus, to establish the jurisdictional requirements of interstate

commerce, Petitioner Moles merely alleged that some funds which he ultimately receives crossed state lines.

The next section of Count I is entitled "Violation Alleged". Petitioner Moles repeatedly stated that the defendants "combined and conspired" or have formed an "unlawful combination and conspiracy", all of which results in not allowing him to be on the defendant hospital's medical staff.

Next, petitioner listed the effects of this "unlawful combination and conspiracy" and stated that the defendants' activity amounted to a group boycott against him. Some of these paragraphs make reference to some form of exclusivity, although petitioner does not specify its nature in Count I. From other portions of the complaint, however, it is alleged that the defendant hospital has facilities for open heart surgery. Plaintiff Wheat is an open heart surgeon; petitioner Moles is a cardiologist and would not participate or utilize the open heart surgery facilities. The amended complaint ends with a pray for relief seeking treble damages, an injunction, and attorney fees.

It is interesting to note that the individual doctor defendants, described as being members of the ad hoc

Committee of the Executive Committee of the medical staff in paragraph nine of the amended complaint, are primarily sued because of their "defamatory" remarks contained in their committee report which recommended the nonreappointment of petitioner Moles to the hospital medical staff. In fact, petitioner Moles has sued each of them now in State Court. Each of those defendant doctors, however, has a specialty other than cardiology and does not practice in competition with petitioner Moles.

POINT I

THE AMENDED COMPLAINT DOES NOT ALLEGE A CONSPIRACY TO BOYCOTT OR MONOPOLIZE.

POINT II

THE PLAINTIFF AMENDED ALLEGATIONS ARE INSUFFICIENT TO ESTABLISH SHERMAN ACT SUBJECT MATTER JURISDICTION IN THAT THERE IS NOT A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE.

Argument

POINT I

The amended complaint does not allege a conspiracy to boycott or monopolize.

The Honorable George C. Young, Chief Judge of the United States District Court for the Middle District of Florida, premised his dismissal of Count I of petitioner Moles' amended complaint on two gounds, both of which are easily discernable by a cursory reading of his memorandum opinion: 1) Moles has not alleged a conspiracy to boycott or monopolize for from the face of the Amended Complaint he has alleged no more than a single refusal to deal on the part of a corporation; and 2) Moles has failed to allege sufficient ultimate facts to establish a substantial effect on inter-

state commerce upon which to premise Sherman Act subject matter jurisdiction. In his Petition, Moles totally ignores the first basis upon which his amended complaint was dismissed. This deficiency is crucial in light of the well settled law on the point.

Moles states in his introductory remarks to Count I of his amended complaint that this action is premised on "a continuing violation of the Antitrust Laws of the United States (15 USC §§1 and 2) by the Defendants." (¶1, amended complaint, R-3). Thereafter, in paragraphs 26 through 34, Moles repeatedly uses the phrases, "combination and conspiracy" or "combined and conspired" to described the Defendants' activities. This language culminates in paragraph 30:

> Defendants' combination, conspiracy and intent amount to a group boycott against Plaintiff in unreasonable restraint of commerce.

It is axiomatic that to have a "group boycott" you must have a group. A review of Moles' amended complaint reveals, however,

that he has alleged no "group" cognizable in antitrust actions.

Paragraphs 5 through 9 identify the Defendants. Morton F. Plant Hospital, Inc. is alleged to be "a Florida not-for-profit corporation" (¶5). John B. Sweger is "a member of Defendant Hospital's Board of Trustees and was its Chairman at all times material to this complaint" (¶6). Roger S. White "is the Executive Director of Defendant Hospital charged with its administration on a daily basis, management of its business affairs and coordination between the medical staff and the Board of Trustees" (¶7). Paul Straub was "the Chief of Medical Staff at Defendant Hospital and was Chairman of the Executive Committee of the Medical Staff" (¶8). The remaining four defendants are identified as:

> members of that committee of the Executive Committee of Defendant Hospital's Medical staff known as the "Ad Hoc Committee" which convened January 29, 1976 to review the Executive Committee's recommendation that Plaintiff Moles not be reappointed to the medical staff.
> (¶9)

Unmistakably, Moles has alleged that all individual Defendants are officers, employees or agents of the Defendant Hospital

corporation.

The law is well established under Section 1 of the Sherman Antitrust Act, 15 USCA §1, that there must be a combination, conspiracy, or contract in restraint of trade to allege a violation. See Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953); Quigley v. Exxon Co., 376 F.Supp. 342 (E.D. Pa. 1974). To have any of the above, it is definitional that there be at least two persons or entities. See Timkin Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947).

If a corporation is involved in the alleged conspiracy or combination, it must interact with another entity or individual before there is a violation. The mere action within the corporation is insufficient to formulate a conspiracy. As was so aptly said by the court in Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 at 914 (5th Cir. 1952):

> A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. . . .

A corporation cannot conspire or combine with its officers or agents to violate the Antitrust laws. Solomon v. Houston Corrogated Box Co., Inc., 526 F.2d 389, 396 (5th Cir. 1976); Quigley v. Exxon Co., 376 F.Supp. 342 (E.D. Pa. 1974). See Mackey v. Sears Roebuck & Company, 237 F.2d 869 (7th Cir. 1956), cert. dismissed, 355 U.S. 865 (1957).

Here, a single hospital has declined to renew Moles' staff privileges pursuant to the procedures provided for in the Hospitals' by-laws. No one has denied any medical services to any patient. Also, none of the doctor defendants practice the same specialty as petitioner or are involved with the open-heart surgery team.[1] This case involves no more than a single refusal to deal with the Plaintiff by the Defendant Hospital.

Section 1 of the Sherman Act prohibits combinations, conspiracies and contracts in restraint of trade. Bare bones allegations concerning these purported restraints will not be tolerated—the plaintiff who seeks to recover for a

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[1]Plaintiff is a cardiologist. Ross is a urologist; Buckley and Hatcher are general surgeons; Straub is a family practitioner; and Meriwether is a pediatrician.

violation of the antitrust laws must specify with at least some degree of particularity, the overt acts in which the Defendants allegedly engaged. Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 1993 (5th Cir. 1979); Adams v. American Bar Association, 400 F.Supp. 219 (E.D. Pa. 1975).

Moles alleges that the Defendants entered into a conspiracy to deny him staff privileges at Defendant Hospital. No statements of ultimate fact are alleged to establish this combination and conspiracy. Moles merely says the Defendants' activity was arbitrary and thus, unlawful. Such conclusory pleadings do not state a cause of action under Section 1 of the Sherman Act.

Furthermore, and more importantly, the Petitioner was not pled the necessary injury to the public to bring his amended complaint under Section 1 and entitle him to any relief. Kinniar-Weed Corp. v. Humble Oil, 214 F.2d 891 (5th Cir. 1954). In Riggall v. Washington County Medical Society, 249 F.2d 266 (8th Cir. 1957), cert. denied, 355 U.S. 954 (1958), the plaintiff sought to redress his denial of

membership in the local medical society. The court, in denying the relief sought by plaintiff, observed that

> . . . the complaint is confined to plaintiff's private medical practice. It charges no economic burden on the public by reason of the alleged acts of the defendants. There is no charge that the rejection of plaintiff's application for membership in the Washington County Medical Society resulted in the raising or fixing of fees charged the public by other physicians . . . Plaintiff has not been prevented from practicing his profession, but in the final analysis, his complaint is that he could practice it more profitably but for the acts of the defendants. The Sherman Antitrust Act was not primarily to protect the individual but a private party may not recover under the act unless there has been an injury to the general public economically. 249 F.2d at 268 (citations omitted).

In the case at bar, Moles has not alleged any injury to the public in the form of higher fees or price fixing or any other economic burden. Nor does the amended complaint allege that the purported activity has prevented him from practicing his profession. All Moles has alleged is that he could practice more profitably at the Defendant Hospital. That allegation does not establish a Section 1 Sherman Action Violation.

There is no injury to the public.[2] See Sokol v. University Hospital, Inc., 402 F.Supp. 1029 1029 (D. Mass. 1975; Adams v. American Bar Association, 400 F.Supp. 219 (E.D. Pa. 1975).

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[2]The Sherman Act does not purport to afford remedies for all torts or breaches of contract committed by or against persons engaged in interstate commerce. Hunt v. Crumboch, 325 U.S. 821 (1944). In short, not every case is an antitrust case, and that is particularly true of the case at bar.

Point II

The Plaintiff amended allegations are insufficient to establish Sherman Act subject matter jurisdiction in that there is not substantial effect on interstate commerce.

Petitioner would have this Court believe that the entire physician/patient/third-party payor system rests on the Court's reversal of this case. When stripped of such grandiose platitudes, however, this case merely and singularly involves the decision of one hospital in west central Florida not to renew the petitioner's staff privileges at that hospital.

This Court is eminently familiar with the interstate commerce requirements of the Sherman Act. Petitioner Moles does not maintain, and has not in the past, that the activities alleged are "in" interstate commerce. Subject matter jurisdiction, if at all, is premised on the substantial effect" on interstate commerce theory. In short, to state a claim over which the Federal Courts have jurisdiction, Moles must allege ultimate facts that demonstrate that the complained of activity had a substantial effect on interstate commerce.

To determine if that requirement has been met, the Petitioner's factual allegations must be reviewed and taken as true. See, e.g. McLain v. Real Estate Board of New Orleans, Inc., _____ U.S. _____, 100 S.Ct. 502 (1980); Hospital Building Co. v. Trustees of the Rex, 425 U.S. 738 (1976). Under the heading, "Trade and Commerce," beginning with paragraph 12 and continuing through paragraph 25 of the amended complaint, Moles attempts to sufficiently allege the interstate commerce requirements but fails. Recognizing that appointment of licensed physicians to the Defendant Hospital's medical staff is controlled by the By-Laws of the Defendant Hospital and, at most, by Florida law (neither of which are within interstate commerce), Moles alleges that he receives a substantial portion of the fees charged his patients from insurance carriers and the federal government under the Medicare and Medicaid programs. Moles alleges that some of these insurance carriers are located out of Florida, and that funds from those companies, along with the funds from the

federal government, cross state lines, thereby establishing interstate commerce.

These allegations fail to meet the interstate commerce requirements because (1) the relationship between Petitioner and Defendants is not in interstate commerce; (2) there is no nexus between the anticompetitve activity purportedly alleged (not renewing Petitioner's staff privileges) and interstate commerce (flow of money); and (3) even assuming there is a nexus, it is incidental and de minimis, not resulting in a substantial effect on interstate commerce. In short, the mere fact that some funds which may ultimately go to the petitioner cross state lines, whether they be from insurance companies or the federal government, is insufficient to meet the interstate commerce requirements of the Sherman Act.

Petitioner evidently feels the substantial effect upon interstate commerce revolves around his ultimate receipt of some payment for his medical services to his patients from funds which have traveled across state lines. The fact that

some money may cross state lines, however, has no nexus to the anticompetitive activities alleged which appears to be some conspiracy to curtail petitioner's medical practice. Petitioner may not invoke the Sherman Antitrust jurisdiction of the federal courts by merely alleging some contact with something which has crossed a state line or has its genesis with the federal government.

An analysis of the allegations in the amended complaint reveal that Moles' patients are the person or persons chargeable for the medical services he performs.[3] Those patients are responsible for the payment of Moles' fees, although some or all of those fees may be ultimately paid by an insurance company or the federal government in relation to some patients. Petitioner has not alleged that Defendants' actions affected his relationships with the insurance carriers or the federal government. There is no allegation that

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[3] Customarily, a person for whom a service is performed is responsible for the payment to the provider of that service. Petitioner alleges that he provides medical services to his patients. The logical inference then is that those patients are responsible for paying him. Petitioner has not alleged otherwise, and he has the burden of pleading the ultimate facts upon which he relies.

Defendants' actions affected the relationship of his patients with their insurors or the federal government; there is no decrease in the benefits those patients receive. Nor has petitioner alleged that Defendants' actions have affected his entitlement to payment for medical services he performs. The Defendants' actions, if true, have not affected petitioner's relationship with the insurance companies nor with the federal government. He can still obtain funds from those sources.

Moles obviously takes the position, however, that the mere receipt of federal funds in the form of Medicare/Medicaid payments is sufficient to automatically establish Sherman Act jurisdiction. This logic is fallacious for at least three reasons: first, the mere presence of federal funds does not invoke the antitrust jurisdiction of the federal courts or establish interstate commerce under the Sherman Act in and of itself.

Second, taken to its logical conclusion, the interstate commerce requirement of the Act would be a nullity in every case in which United States currency was utilized for payment. Such an absurd conclusion was not intended by Congress in its enactment of 15 USC §1, et seq., nor permitted by the commerce clause of the United States Constitution.

Third, although there are no cases directly holding that the mere receipt of Medicare/Medicaid funds establishes the jurisdictional basis in antitrust cases, the courts' holding vis-a-vis the receipt of federal funds in other hospital cases to establish jurisdiction is helpful. Specifically, receipt of Hill-Burton funds, 42 USC §§291, et seq., has been repeatedly held insufficient to establish the state action requirements in cases dealing with physician staff privileges in participating hospitals. See Madry v. Sorel, 558 F.2d 303 (5th Cir. 1977), cert. denied., ____ U.S. ____(1978); Watkins v. Mercy Medical Center, 520 F.2d 891 (9th Cir. 1975); Jackson v. Norton-Children's Hospitals, Inc., 487 F.2d 502 (6th Cir. 1973); Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973); Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

Moreover, in Slavcoff v. Polyclinic Hospital, 375 F.Supp. 999 (M.D. Pa. 1974), the court held that

> [T]he hospital's receipt of a substantial portion of its operating income from the Medicare and Medicaid programs does not convert the activity challenged here into governmental action. 375 F.Supp. at 1003.

See Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973). Mere receipt of federal funding through Medicare or

Medicaid does not establish interstate commerce for antitrust jurisdictional requirements.

Assuming arguendo that there is a nexus, it is unconsequential and creates no substantial effect on interstate commerce. In Wolf v. Jane Phillips Episcopal-Memorial Medical Center, 513 F.2d 684 (10th Cir. 1975), a case very similar to the case at bar, the plaintiff, an osteopathic physician practicing in Bartlesville, Oklahoma, sought medical staff privileges at the two hospitals in town. His applications were denied and he sought redress, alleging antitrust violations. The court, citing United States v. Oregon State Medical Society, 343 U.S. 326 (1952), Riggall v. Washington County Medical Society, 249 F.2d 266 (8th Cir. 1957), cert. denied, 355 U.S. 954 (1958), and Spears Free Clinic and Hospital v. Cleere, 197 F.2d 125 (10th Cir. 1952), held that the single doctor's practice in relation to the non-admitting hospital was no more than, at most, "an insubstantial effect upon interstate commerce." 513 F.2d at 687.[4] Likewise, the Petitioner's practice of medicine and

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[4] Petitioner misinterprets the holding of Wolf at pg. 10 of his brief. Wolf held there was no substantial effect alleged by the plaintiff—the court did not hold that the practice of medicine is not a trade or commerce. The question of exemption was noted but not discussed.

furnishing medical services sub judice is wholly intrastate in character and results in the same insubstantial effect. See Elizabeth Hospital v. Richardson, 269 F.2d 167 (8th Cir. 1959).

In Crane v. Intermountain Health Care, Inc., ____ F.2d _____ (10th Cir. 1980), the Tenth Circuit cited with approval its holding in the Wolf case. Quoting from Wolf, the Crane court held that

> aside from a general allegation that his business involves interstate commerce, the plaintiff does not suggest that the defendants' conspiracy threatens his purchase of interstate goods or that the flow of such goods would be affected in any way by his exclusion from the defendants' medical staff. * * * Whatever effect the alleged conspiracy might have upon interstate commerce in goods purchased by the plaintiff is insubstantial and therefore an insufficient basis for jurisdiction.

_____ F.2d at _____. The Tenth Circuit cogently and correctly distinguished Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); and Hospital Building Co. v. Trustees of Rex Hospitals, 425 U.S. 738 (1976). Those distinctions directly apply in this case.

In Trustees of the Rex Hospital, the plaintiff, a North Carolina corporation operating a 49-bed hospital in Raleigh, North Carolina, sought to relocate and expand its

capacity to 140 beds. Its plans were stymied allegedly by the concerted action of the defendants. In instituting suit, the plaintiff alleged several areas of interstate commerce: (1) 80% of the plaintiff's supplies and medicines are purchased outside of North Carolina; (2) a substantial number of patients at plaintiff's hospital come from areas outside North Carolina; (3) a large portion of its revenues come from out-of-state insurance companies or from the federal government through Medicare and Medicaid programs; (4) plaintiff pays a management service fee based on gross receipts to its parent company, a Delaware corporation based in Georgia; and (5) a large part of the plaintiff's four-million dollar expansion was planned to be financed through out-of-state lenders. Plaintiff alleged that all these interstate commerce involvements were adversely affected by defendants' anticompetitive conduct.

In reviewing the above allegations, the Supreme Court held that

> . . . the complaint, fairly read, alleges that if respondents and their co-conspirators were to succeed in blocking petitioner's planned expansion, petitioner's purchases of out-of-state medicines

> they would otherwise be. Similarly, the management fees that petitioner pays to its out-of-state parent corporation would be less if the expansion were blocked. Moreover, the multimillion dollar financing for the expansion, a large portion of which would be from out of state, would simply not take place if the respondents succeeded in their alleged scheme. This combination of factors is certainly sufficient to establish a "substantial effect" on interstate commerce under the Act. 425 U.S. at 748 (Emphasis added).

By comparison, Moles' amended complaint is easily distinguishable. Aside from the fact that our petitioner is a physician, whereas the plaintiff in the Rex was a 49-bed hospital, the alleged interstate commerce is de minimis when compared. petitioner has only superficially alleged that he receives funds from out-of-state insurance companies and the federal government. He has not alleged how much comes from these sources or the percentage that comprises of his total income. Moreover, this is but one of five categories alleged in the Rex. And the Supreme Court held it was a combination of all those alleged interstate commerce activities, including the loss of four-million dollars in proposed financing, that precipitated its finding of "substantial effect."

Petitioner does not allege he purchases medical equipment, supplies or drugs in interstate commerce, much less the amount of those purchases. He does not allege treatment of out-of-state patients -- in fact, he does not allege that he treats any patients. All that petitioner alleges is that there is an "interstate" fund which provides the substantial fiscal basis for the business of providing health care for compensation" (¶20, Moles' amended complaint, R-3).

Petitioner's allegations are but a drop in the proverbial bucket and do not meet the interstate commerce requirements.

Petitioner also relies on McLain v. Real Estate Board of New Orleans, Inc., _____ U.S. _____, 100 S.Ct. 502 (1980).[5] The Supreme Court succinctly set forth the Sherman Act interstate commerce test:

> To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings either that the defendants' activity is itself in interstate commerce or, if it is local in

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[5]Although McLain was decided after the appellate briefs were submitted in this cause, the Fifth Circuit panel laborously questioned counsel for respondents on the effect of McLain on this case. The per curian affirmance was entered two days after oral argument.

> nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce. Gulf Oil Corp. v. Copp Paving Co., supra 419 U.S. at 202.

Petitioner complains, however, that the trial court misapplied this test in ruling against him by finding no "net" affect on interstate commerce. The petitioner misreads the trial court's opinion. Specifically, Judge Young held that the amended complaint contained no allegations which demonstrated any affect on interstate commerce, whether "net", "gross" or otherwise:

> There have been no allegation that defendants have caused any increase (or decrease) in fees charged thereby causing a change in the flow of insurance benefits flowing in interstate commerce from the federal government and/or insurance carriers to the ultimate beneficiaries. (Memo opinion pg. 11).

The petitioner's amended complaint contains no allegations within the syntax of McLain which "stimulates or retards," has an "affect", or otherwise "impacts" the flow of interstate commerce, much less to a significant or substantial degree.

The Sherman Act requires activity in interstate commerce or activity which has a substantial effect on interstate commerce before a violation of of its provisions can be established. As the Fifth Circuit Court of Appeals said in Feminist Women's Health Center v. Mohammed, 586 F.2d 530 (5th Cir. 1978),

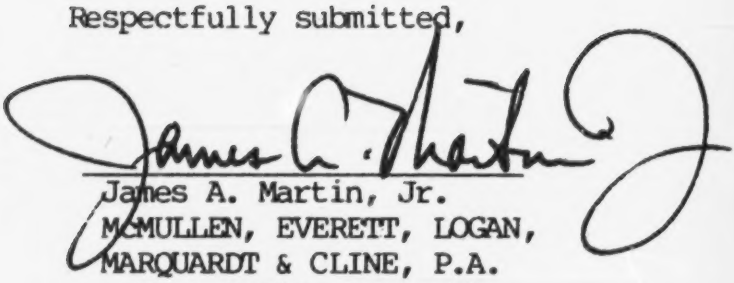
> We recognize that there must be a limit on the reach of Sherman Act jurisdiction. 586 F.2d at 541.

Petitioner's amended complaint does not meet those interstate commerce requirements either in theory or in specific allegations. Therefore, this Honorable Court does not have subject matter jurisdiction over the amended complaint herein, nor does that amended complaint state a claim which relief can be granted.

Conclusion

The learned trial court was eminantly correct in dismissing the petitioner's complaint. In the words of Judge Young, "not only are the interstate commerce allegations insufficient, but in addition, the allegations of conspiracy fail to adequately allege that some person other than an officer or agent of the Defendant hospital corporation conspired with the Defendant hospital." Memorandum Opinion, Page 15. This Honorable Court should deny the Petitioner for Writ of Certiorari.

Respectfully submitted,



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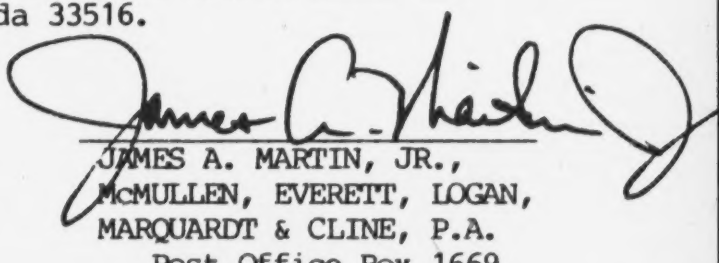
CERTIFICATE OF SERVICE

I, JAMES A. MARTIN, JR., Attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of September, 1980, I served copies of the foregoing Response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the Petitioner

by leaving three copies thereof at the office of Howard C. Batt, Esq., Counsel for Petitioner, at his office at 600 Bypass Drive, Suite 200 Clearwater, Florida 33516.



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